Kuykendall Painting Co. *and* District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL–CIO. Case 14–CA–21628

August 10, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On March 25, 1992, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed exceptions and a supporting brief and an answering brief to the Respondent's exceptions. The General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] In light of our decision to adopt the judge's recommended dismissal of the complaint on jurisdictional grounds, we find it unnecessary to pass on the Respondent's exceptions.

Caryn L. Fine, Esq., for the General Counsel.
William C. Cody, Esq., for the Respondent.
Janet E. Young, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in St. Louis, Missouri, on January 30, 1992, based on an unfair labor practice charge filed on September 23, 1991, as amended on November 7, 1991, by District Council No. 2 of the Brotherhood of Painters and Allied Trades, AFL–CIO (the Union or the Charging Party), and a complaint issued by the Regional Director of Region 14 of the National Labor Relations Board (the Board), on November 8, 1991. The complaint alleges that Kuykendall Painting Co. (Respondent), withdrew recognition from the Union, failed and refused to make contributions required under a collective-bargaining agreement and repudiated that agreement in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices and asserts affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Painting and Decorating Contractors of America, Chapter No. 2 (PDCA), is an association of employers engaged in the construction industry as painting subcontractors, which exists for the purpose, inter alia, of representing its members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

It was stipulated that Custom Coatings, Inc., a member of the PDCA, is and has been at all times material herein a Missouri corporation with an office and place of business in St. Charles, Missouri, where it is engaged as a painting contractor in the building and construction industry performing both residential and commercial painting. During the 12-month period ending October 31, 1991, Custom Coatings, Inc., in the course and conduct of its business operations, purchased and received at its St. Charles, Missouri facility, goods and materials valued in excess of $50,000 from other enterprises located within the State of Missouri which had received said goods and materials directly from points outside the State of Missouri and had received products, goods and materials valued in excess of $50,000 directly from points located outside the State of Missouri.

Custom Coatings, Inc. has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The employer members of the PDCA are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent is not a member of the PDCA. The record is devoid of evidence with respect to any interstate implications of Respondent's business.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Respondent has been in business since 1973, engaged in painting homes under construction in subdivisions and other light commercial painting. John Kuykendall, its proprietor or president, was a union member and, in 1980, 1983, and 1985, executed the collective-bargaining agreements which had been negotiated between the PDCA and the Union. Respondent operated as a union contractor. It complied with the terms of the contracts, paid the wages and fringe benefits required under them, including payments into the various benefit funds, and secured union member-employees from the Union. Respondent, however, was never a member of the PDCA and never participated in its negotiations.

The agreements which Respondent signed stated that they were between it and the Union. They continued, as follows:

> The Union is herewith recognized as the exclusive bargaining representative of all employees covered by this Agreement.

> The . . . (PDCA) is herewith recognized as the exclusive Bargaining Representative for contractors signatory to this Agreement . . . .

According to representatives of the Union (Joseph Shatro, business manager) and of the PDCA (Raymond Hagemeyer, former president and chairman of the negotiating committee), the foregoing language bound all signatories of one PDCA-union agreement to the subsequent agreements until they gave timely notice of an intention to bargain separately. No bylaw or constitutional contractual provision imposing a notice requirement was adduced.

It was the Union's practice to send a list of all the signatories to the prior agreement to the Federal Mediation and Conciliation Service with its 60-day termination letter, as an indication of the parties involved in the negotiations. It was the practice of the Union and the PDCA to compare withdrawal letters each had received prior to the opening of negotiations to determine for whom the PDCA would be bargaining.

As noted, Respondent executed copies of the agreement negotiated between the Union and PDCA for the 1980–1982, 1983–1985, and 1985–1988 terms. Kuykendall never sent either the Union or the PDCA notice that he did not intend to be bound by the PDCA's negotiations for the 1988–1991 agreement. Respondent's name was included among the contractors listed by the Union in its FMCS notification; that notification, basically a list of the union painting contractors as of mid-1987, included some contractors who had expressly withdrawn from the PDCA negotiations.

On June 25, 1988, the Union sent Respondent a notice that it was terminating the ''current agreement between [the Union] and your company'' as of August 31. That letter requested that Respondent ''advise [it] if you have designated the [PDCA] as your bargaining representative.'' No response, either acknowledging PDCA as his bargaining representative or withdrawing its alleged authority, was received from Kuykendall.

On June 27, 1988, the Union sent Respondent a demand for recognition based upon signed authorization cards ''from a majority of your bargaining unit employees.''[1] While the Union has no record of receiving that agreement, signed, from Respondent, such an agreement, presumably from Respondent's files, signed and dated by both parties on August 26, 1988, was entered into evidence.

The PDCA and the Union reached a new agreement sometime in the summer of 1988, to be effective from September 1, 1988, to August 31, 1991. The Union had copies printed and sent out to each of the employers who had been signatory to the prior agreement other than those who had withdrawn PDCA's authority to negotiate on their behalf. A copy was mailed to Respondent; Kuykendall did not sign or return it.

In October, Shatro assigned Union business agent Irvin Keys to locate Kuykendall and get him to sign the agreement. Keys found Kuykendall working on a jobsite in November or December 1988[2] and asked him to sign the contract. Kuykendall, he testified, stated that he had been out of town dealing with family problems and was looking into the possibility of ''getting into something else.'' Keys did not insist that Kuykendall sign at that time but said that he would check back later.

Keys spoke with Kuykendall on another jobsite in early 1989. He was still trying to get the contract signed and asked what Kuykendall was going to do. According to Keys, Kuykendall ''still talked about getting out of the painting business . . . it wasn't being profitable . . . he had mentioned . . . some land down around Hillsboro and he was thinking about a trailer park.''

Finally, according to Keys, he and business agent James Krout found Kuykendall on another jobsite in February or March 1989. Keys reiterated the request that Kuykendall sign the contract. Kuykendall, according to the testimony of both agents, said that he was getting out of the painting business, that he was going to open a trailer park after he completed the last couple of houses. Krout allegedly told Keys that this was no surprise to him, that Kuykendall had told him of his intentions at an earlier time.[3]

Kuykendall acknowledges having several conversations with Keys wherein Keys pressed him to sign the agreement. In each, he said, he refused to sign the contract because the annual wage increases were too costly. In their last conversations, in April and May 1989, he said, he told Keys that he was going to get out of the Union and just paint, by himself. Keys threatened to pull his painters and told him that he would be prevented from painting subdivisions in St. Louis. He purportedly told Keys that he would continue as a painter because that was all he knew how to do.

Kuykendall denied telling Keys or Krout that he was thinking about, or intended, to go into the mobile home park business. In the April conversation, he claimed, he told Keys, in passing, that he had bought some property and might put a trailer on it.

In resolving this credibility issue, I note as significant that the Union did not pull Kuykendall's painters, or file either a grievance or unfair labor practice charge against him. The Union would have had a right, and would have been expected to take such actions, if Kuykendall had flatly refused to sign the contract, particularly if he also indicated that he was going to continue as a nonunion painter. On the other hand, I note that Kuykendall was continuing to pay the wages and benefits required under that contract, somewhat obviating the Union's inclination to apply pressure upon him. On balance, considering the above, the corroboration of Keys by Krout and the somewhat more explicit recollections of Keys and Krout than Kuykendall, I credit Keys and Krout. I find that Kuykendall said something in their final conversation which, in light of his earlier references to land and a trailer, lead Keys to believe that he was going out of the painting business.

On May 24, 1989, Kuykendall's attorney, John Kilo, called Shatro. He testified that he told Shatro that

[1] The demand was made to satisfy perceived requirements pursuant to *John Deklewa & Sons*, 282 NLRB 1375 (1987).

[2] Under direct examination, Keys testified that he found Kuykendall's employees on the Winding Trails subdivision in October or November but did not locate Kuykendall, himself, until late November or early December. Under cross examination, he testified that he spoke with Kuykendall in late October or early November.

[3] According to Krout, Kuykendall had told him as early as July 1988, at the election when Krout had become a business agent, that he was going to go out of the painting business and into a mobile home park. Krout did not mention this to anyone until after the February or March conversation.

Kuykendall was interested in getting out of the Union and that he would be sending a letter withdrawing recognition as an employer and individually. He claimed to have told Shatro that Kuykendall was going to continue as a painter, with a downsized business, and that Shatro had said that Kuykendall would not be able to get union painters. He then read Shatro a draft of the letter he was going to send and was told that it was ''Fine.''

Shatro recalled the conversation differently. When Kilo told him that Kuykendall was going out of business, he said, he asked for a letter so that he could notify the fringe benefit funds. He denied that Kilo told him that Kuykendall was going to continue as a nonunion painter, with a smaller crew. No letter was read to him at that time.

No letter was sent until July 24, 1989. At that time, Kilo wrote:

> This is to advise you that Kuykendall Painting Co., Inc. is withdrawing any further recognition as an employer under the Painter's Union. Please be further advised that John Kuykendall, individually, is withdrawing as a member . . . to take effect immediately.

Noting the delay between the May 24 conversation and the July 24 letter, the absence of any reference in the letter to Kuykendall's future plans, and the substantial improbability that the chief officer of a union would authorize a union contractor to go nonunion in mid-term without a loud objection, I must credit Shatro. Kilo may have meant to imply that Kuykendall was going to remain in business as a non-union painting subcontractor but I cannot find that he told that to Shatro.

As noted, Respondent complied with the terms of the 1988–1991 agreement until July 28, 1989. After that time, as the Union determined from the fringe benefit fund records, all of his union employees, including his son, had begun working for other union contractors.

The Union made no effort to pursue Kuykendall's signature by seeking him out at his home. He was not observed on any jobsites during the remainder of 1989, 1990, or until July 1991. However, Respondent stipulated that it never went out of business. Kuykendall continued to paint homes, either by himself or with no more than one employee, throughout that entire time.[4]

A new collective-bargaining agreement, effective September 1, 1991 through August 31, 1994, was reached in the summer of 1991. Kuykendall's name had not been among those submitted to FMCS with the Union's notification.

Krout found Kuykendall working in a subdivision in July 1991. When confronted, Kuykendall said that nothing had changed and asked Krout not to make trouble for him. The Union sent an ''area standards'' letter to Kuykendall, threatening to engage in informational picketing. It also filed a grievance under the new contract, alleging that Kuykendall had breached the agreement by failing to pay wages and remit both dues and fringe benefit contributions. That grievance has been held in abeyance pending this proceeding.

[4] General Counsel contends that Respondent failed to establish that Kuykendall reduced his workforce to not more than one employee. His testimony to that effect, however, was credible and uncontradicted; moreover, it was not Respondent's burden to prove the inappropriateness of the unit. It is irrelevant to the issue of unit appropriateness that Kuykendall, as owner of the business, performed unit work and thus ''displaced the position of a second unit employee.'' A unit which includes the owner and one other is still a single employee unit and inappropriate.

B. *Analysis and Conclusions*

General Counsel and the Union contend that Respondent's signing of the 1980, 1982, and 1985 contracts binds it to both the multiemployer unit and to the terms of the PDCA-Union agreements negotiated in 1988 and 1991. They further contend that Kuykendall fraudulently misrepresented his intention to go out of business, thereby forestalling the application of Section 10(b), the statute of limitations. Respondent contends that it was an individual employer, not in commerce and not obligated to execute the PDCA agreements, with, at most, a separate and ultimately inappropriate one man unit. Respondent further contends that the finding of any unfair labor practice is precluded by Section 10(b).

In *Ruan Transport Corp.*, 234 NLRB 241 (1978), the employer signed an agreement reached earlier between the union and a council of employers. That employer had not participated in the negotiations, was not a member of that council, and had never expressly authorized that council to negotiate on its behalf. However, the agreement which the employer signed stated:

> The employees covered under this Agreement shall constitute one bargaining unit. Accordingly, the [Council] and the Employers who are parties to this Agreement acknowledge that they are part of a multi-employer collective-bargaining unit comprised of [the Council] and those of their members who have or will certify the [Council] to represent them for the purpose of collective bargaining, and only to the extent of such authorization; and also such other individual employers who have or may singly become parties to this agreement. [Emphasis supplied.]

The employer did not participate in the next round of negotiations between the council and the union; neither did it expressly authorize or expressly withdraw authorization for the council to bargain on its behalf. After the union and the council reached a new agreement, it was presented to the employer, who refused to sign it. An 8(a)(5) charge was filed.

The Board in *Ruan* held, in principles equally valid today:

> we note that a multiemployer unit, unlike other types of bargaining units, is consensual in nature. The Board has consistently held that ''the essential element warranting the establishment of multiple employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than by individual action.'' *As a general rule, the Board has found that an employer does not become part of a multiemployer bargaining group (i.e., it does not intend to be bound by group bargaining) where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.* [Emphasis supplied; footnotes omitted.]

In *Ruan*, the Board specifically found that the ''one bargaining unit'' provision did not serve to authorize the council to negotiate on the employer's behalf in subsequent years. Agreeing with the administrative law judge that this clause was less than a model of clarity, it went on to say:

> assuming *arguendo*, that the provision was clearly written and unambiguous, we find that such a bare covenant by the Respondent by which it agreed to be part of a multiemployer bargaining group does not itself suffice to clearly demonstrate that the Respondent delegated authority to the [council] to represent it in future negotiations. The most than can be said for the ''one bargaining unit'' provision is that it perhaps implicitly authorized the [council] to represent the Respondent in [the next] negotiations. However, we find that something in addition to a mere implied delegation of authority is needed in order to constitute *clear* evidence of an *unequivocal* intent on the part of an employer to be bound by group bargaining. We would require, for example, some conduct on the part of the employer which indicates that it actually pursued a group course of action with regard to labor relations.

See also *Southern California Pipe Trades Council (Plumbing Industry)*, 292 NLRB 270, 281 (1989).

In the instant case, the agreements which Respondent had signed were expressly between it and the Union; moreover, they did not purport to apply to or create a multiemployer bargaining unit. Further, the language purporting to accept PDCA as the employer's bargaining representative was ambiguous in that it did not specify whether it was solely for the term of this agreement or was intended to apply to future negotiations.[5]

Thus, the agreements and the relevant conduct of the employers in *Ruan* and the instant case are equivalent. Neither engaged in any conduct indicating an actual pursuit of group action.

In *Ruan*, the Board further noted that the employer had advised the union of its intent to bargain separately and, in fact, such negotiations took place. In the instant case, the Union demanded recognition from Respondent based upon its majority status *among Respondent's employees*, terminated the agreement which it had *with the Respondent, and asked Respondent to notify it if Respondent was designating the PDCA as bargaining agent.* Kuykendall did not respond to the latter request. These actions, by both the Union and the Respondent, negate the unequivocal intent required to establish a multiemployer bargaining unit.[6]

Having found an insufficiency of proof that Respondent had obligated itself to multiemployer bargaining or included its employees within a multiemployer bargaining unit, I must further find that the critical elements of this case likewise fail.

Respondent was not a member of the PDCA. Neither was it aligned with the PDCA in multiemployer bargaining or in a multiemployer bargaining unit. Therefore, this record is devoid of any evidence establishing jurisdiction of the Board over Respondent.

Moreover, after July 1989, the Respondent employed, at most, one employee. There was, therefore, no unit appropriate for collective bargaining.

In the absence of evidence establishing jurisdiction, I need not reach the questions of Respondent's repudiation of the agreement, failure to comply with that agreement, withdrawal of recognition or alleged fraudulent concealment of a cause of action tolling the statute of limitations.

Accordingly, I make the following

CONCLUSIONS OF LAW

1. Respondent is not an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At no time after the withdrawal of recognition did Respondent employ employees in a unit appropriate for the purposes of collective bargaining.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On the basis of these findings of fact and conclusions of law, and the entire record in this proceeding, I issue the following recommended[7]

ORDER

The complaint herein is dismissed in its entirety.

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[5] Contra, *J. D. Candler Roofing*, 258 NLRB 341 (1981), cited by the General Counsel, where the employer's power of attorney had expressly authorized the association to bargain on its behalf for that contract and for ''successor labor agreements until revoked.''

[6] The discussions between the PDCA and the Union regarding who the PDCA was bargaining for, and the Union's notification to FMCS purporting to name the employers involved in its negotiations with PDCA are immaterial. ''It is, of course, well settled . . . that agency and authority cannot be proved by the hearsay statements of the alleged agent himself.'' *Brownell v. Tidewater Associated Oil Co.*, 121 F.2d 239 (3d Cir. 1941); *Wigmore Evidence*, Chadbourn Rev., Vol IV, § 1078, p. 176.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.